# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1944

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## No. 13

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ANTHONY CRAMER,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

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# BRIEF FOR PETITIONER PURSUANT TO COURT'S ORDER FOR FURTHER ARGUMENT

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This brief is submitted pursuant to the following order of the Court:

"This case is restored to the docket and assigned for reargument during the first week of argument in the October Term, 1944.

"The Court does not desire further argument on the admissibility of evidence or as to the effect of error, if any, in admitting evidence.

"Further briefs and argument are desired as to the questions raised under the treason clause of the Constitution, particularly as to the meaning of 'treason' and of 'overt act' and as to the requirement that such overt acts be proved by testimony of two witnesses; also as to whether each overt act submitted to the jury complied with constitutional requirements."

I

**A consideration of the meaning of the treason of adhering to enemies and overt acts thereof**

With respect to the meaning of an overt act of treason, petitioner in his first brief argued that to be sufficient an overt act of treason must openly manifest treason. Petitioner pointed out that any less stringent rule led to the conclusion adopted by the Circuit Court in this case that an overt act in treason had no more significance than an overt act in conspiracy (R. 485). Petitioner argued that on this view of the meaning of overt acts in treason the two witness rule becomes meaningless verbiage and the protection sought to be afforded the accused is mere illusion.

As opposed to the rule advanced by petitioner, respondent argued that a sufficient overt act of treason is an act which is "a part of a program or course of action the purpose and tendency of which are to adhere to the enemy, giving them aid and comfort, and must be related to, and in furtherance of, the accomplishment of the treasonable purpose."

The divergence of these contentions is fundamental, and the question raised goes to the essence of what protection, if any, was sought to be afforded in the Constitution to those accused of the crime of treason, the crime recognized to be the greatest of all crimes. The significance of the two witness rule in treason is basic. Undoubtedly one cannot be convicted of treason without having performed an act that is traitorous. According to petitioner's argument only such an act is an overt act of treason, and a significant protection is provided the accused in the Constitutional provision that such an act must be proved by two witnesses. Respondent, however, argues that the overt act in treason may be an innocent act, and need be connected with the traitorous act only by showing it to have been a

part of the program or course of action which included the traitorous act.

The full force and effect of respondent's contention can best be appreciated by consideration of a hypothetical case. Consider, for example, a case of treason of adhering to enemies of the United States in which the act of treason was that the accused, John Doe, a citizen of the United States, at or about 10 A. M. on the morning of June 1, 1944, attended a meeting at 50 Main Street and there disclosed to enemy agents secret information concerning the armed forces of the United States. This disclosing of military information would of course be an act of treason, and according to petitioner's argument John Doe could be convicted only if two witnesses testified to this act, and there were evidence of a traitorous intent, which evidence might be supplied by the two witnesses to the overt act or by other witnesses. According to respondent, however, the overt acts in such a case might be quite innocuous, and any of the following would in themselves be sufficient overt acts of treason: 1) that John Doe arose at 9 o'clock on the morning of June 1, 1944; 2) that John Doe had breakfast at 9:13 on the morning of June 1, 1944; 3) that John Doe left his home at 9:30 on the morning of June 1, 1944; 4) that John Doe walked down Main Street at 9:45 on the morning of June 1, 1944; 5) that John Doe at 9:55 on the morning of June 1, 1944 rang the door bell at 50 Main Street. On the testimony of one witness (for according to respondent it need not be alleged as an overt act) that John Doe disclosed secret military information to enemy agents at 50 Main Street at 10 o'clock on the morning of June 1, 1944, the acts aforementioned would qualify as sufficient overt acts of treason since they would be shown to be "a part of a program or course of action the purpose and tendency of which are to adhere to the enemy." Peti-

tioner will readily demonstrate, however, that acts of this type were never considered overt acts of treason.

While it seems clear that, in any view of the English and American precedents prior to the Constitutional Convention, none of the overt acts submitted to the jury herein was legally sufficient, we shall, in view of the Court's memorandum, attempt a comprehensive and chronological review of all the precedents, English and American. We shall also attempt to deduce from these precedents what we deem to be the true meanings of "treason" and "overt act" as these words are used in our Constitution.

In this connection, some preliminary observations may be helpful. Most of the treasons known to English law were utterly rejected by the Constitutional Convention, including the treason of compassing and imagining the death of the king, which thoroughly permeated the English law of treason. Those treasons which remained, namely levying war and adhering to enemies, giving them aid and comfort, refer in plain English to the actualities of levying war on the one hand and giving aid and comfort to the enemy on the other. There would seem to be little basis for construction and interpretation which might stretch these simple words and phrases to cover attempts to levy war or attempts to give aid and comfort or conspiracies or other preparations.

The many months of additional research and study which have been made possible by the Court's direction for reargument, especially in the light of the questions asked by every member of the Court on the original argument on March 9, 1944, have served to develop certain new and additional points of view. They have also served to strengthen the conviction that none of the alleged overt acts of treason submitted to the jury herein was legally sufficient.

It was pointed out and strongly urged upon this Court at the time of the first argument that the crime of treason was viewed by the founders of our Government and our Constitution with disfavor, that it should be scrupulously restricted in its operation to cases clearly coming within the constitutional definition and under no circumstances extended to doubtful cases.

We now contend that the constitutional definition of the treason of adhering to enemies, giving them aid and comfort, is plain and unambiguous on its face, that instances of so-called constructive treason of adhering to enemies, giving them aid and comfort, were never intended to be included and that it was the intent to assign to the Legislature for future definition the vast mass of lesser crimes, such as attempts to give aid and comfort, conspiracies, espionage and so on. If we are right about this, each of the three alleged overt acts submitted to the jury herein is plainly insufficient.

In addition, we shall contend that, even taking the view that the actual and constructive treasons of adhering to enemies, giving them aid and comfort, as established by the various English precedents prior to the Constitutional Convention, were intended by the founders to be included by and carried over into the new definition of treason contained in our Constitution, the overt acts submitted to the jury herein are still insufficient.

With reference to the meaning of an "overt act", it is our contention that the only rule supported by certain authority is that the overt act must be an act of treason, that is, it must be such an act as, when coupled with evidence of the accused's owing of allegiance to the United States, and a traitorous intent, would warrant the submission of the case to the jury. None of the alleged overt acts submitted to the jury herein can survive this simple test.

## A. *The meaning of the treason of adhering to enemies under the English Statute of Treasons, 25 Edward III (1351).*

Any consideration of the Anglo-American law of treason must begin with the English Statute of Treasons, 25 Edward III (1351),[1] the first English criminal statute,[2] the text of which is herewith set forth.[3] While many treason

[1] Some authorities give 1352 as the date, Pollock and Maitland, *The History of English Law*, 2nd edition (Cambridge 1898), Vol. II, p. 502.

[2] Holdsworth, *A History of English Law*, (3rd Ed., rewritten, Boston, 1923), Vol. III, p. 287.

[3] "A Declaration which Offences shall be adjudged Treason. Item, whereas divers opinions have been before this time in what case treason shall be said, and in what not; the king, at the request of the lords and of the commons hath made a declaration in the manner as hereafter followeth; that is to say, when a man doth compass or imagine the death of our lord the king, or our lady his queen, or of their eldest son and heir; or if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; or if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort, in the realm, or elsewhere, and thereof be proveably attainted of open deed by the people of their condition. And if a man counterfeit the king's great or privy seal, or his money; and if a man bring false money into this realm, counterfeit to the money of England, as the money called Lushburgh, or other like to the said money of England, knowing the money to be false, to merchandise or make payment, in deceit of our said lord the king and of his people; and if a man slea the chancellor, treasurer, or the king's justices of the one bench, or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places, doing their offices. And it is to be understood, that in the cases above rehearsed, that ought to be judged treason which extends to our lord the king, and his royal majesty: and of such treason the forfeiture of the escheats pertaineth to our sovereign lord, as well of the lands and tenements holden of other, as of himself. And moreover there is another manner of treason; that is to say, when a servant slayeth his master, or a wife her husband, or when a man secular or religious slayeth his prelate, to whom he oweth faith and obedience; and of such treason the escheats ought to pertain to every lord of his own fee. And, because that many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time, it is accorded, that if any other case, supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgment of the treason till the cause be showed and

statutes had come and gone between 1351 and the time of the American Constitutional Convention,[4] in times of comparative internal peace the English would reduce all treasons to those enumerated in 25 Edward III.[5] While there were numerous other treason statutes in force in England at the time of our Constitutional Convention,[6] 25 Edward III was the most important one.

It will not be useful here to explore the source of the treasons enumerated in 25 Edward III. Suffice it to say that the source is to be found in Anglo-Saxon tribal law and in the Roman Law of *crimen laesae maiestatis* and

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declared before the king and his parliament, whether it ought to be judged treason or other felony. And if peradventure any man of this realm ride armed covertly or secretly, with men of arms against any other, to slay him, or rob him, or take him, or retain him till he hath made fine or ransom for to have his deliverance, it is not in the mind of the king nor his council, that in such case it shall be judged treason, but shall be judged felony or trespass, according to the laws of the land of old time used, and according as the case requireth."

[4] "But afterwards, between the reign of Henry the Fourth and Queen Mary, and particularly in the bloody reign of Henry the Eighth, the spirit of inventing new and strange treasons was revived; among which we may reckon the offenses of clipping money; breaking prison or rescue, when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welshmen; counterfeiting foreign coin; wilfully poisoning; execrations against the king; calling him opprobrious names by public writing; counterfeiting the sign-manual or signet; refusing to abjure the pope; deflowering or marrying, without the royal license, any of the king's children, sisters, aunts, nephews, or nieces; bare solicitation of the chastity of the queen or princess, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or *believing* (manifested by any overt act) the king to have been lawfully married to Anne of Cleve; derogating from the king's royal style and title; and impugning his supremacy; and assembling riotously to the number of twelve, and not dispersing upon proclamation; • • •" Blackstone, *Commentaries on the Laws of England*, Book IV, Chap. VI, [86-87], Wendell's Ed. (N. Y., 1854), pp. 86-87.

[5] 1 Edward 6, Cap. 12 (1547)
1 Mary, Cap. 1 (1553)

[6] See Blackstone, *supra*, Chap. VI, pp. 87 ff.

*crimen falsi*,' and that the treason of adhering to enemies had been recognized in England long before 1351.[8]

There is little available in the way of general discussion of the meaning of the treason of adhering to enemies. The usual comment is that the phrase "adhering to the king's enemies, giving them aid and comfort" is self-explanatory; that the treason is "adhering to the king's enemies," and that its meaning is explained by the phrase in apposition, "giving them aid and comfort":

> "What shall be said to be an adherence to the king's enemies, &c. this is explained by the words subsequent, 'giving aid and comfort to them;' from which it appears, that any assistance given to aliens in open hostility against the king, as by surrendering a castele of the king's to them for reward, or selling them arms, &c. or assisting the king's enemies against his allies, or cruising in a ship with enemies to the intent to destroy the king's subjects is clearly within this branch."[9]

The treasons of adhering to enemies and levying war were considered closely allied. East states:

> "Thus, every species of aid or comfort, in the words of the statute, which, when given to a rebel within the realm, would make the subject guilty of levying war; if given to an enemy, whether within or without the realm, will make the party guilty of adhering to the king's enemies; though in the case of giving aid to

[7] Pollock and Maitland, *supra*, Vol. II, pp. 502 ff., Holdsworth, *supra*, Vol. III, pp. 287-290.

[8] Levying war was the newest of the treasons (Pollock and Maitland, *supra*, p. 505), and was probably not treason before 25 Edward III. Holdsworth, *supra*, Vol. III, p. 461.

[9] Hawkins, *Pleas of the Crown*, Book I, Chapter 2, section 28, see also Coke, *The Third Part of the Institutes of the Laws of England*, cap. 1, sec. 10.

enemies within the realm, a subject might in some instances be brought within both branches of the act."[10]

The treasons of compassing the king's death, levying war against him, and adhering to his enemies, as set forth in 25 Edward III, had undergone constructive extension by the time of the American Constitutional Convention.

While there is nothing in the early authorities to indicate that 25 Edward III, in its specification of the treason of adhering, intended anything less than an actual giving of aid and comfort to the enemy, the English judges of the 17th and 18th centuries found occasion to make trials for treason such a frightful means of oppression that our founders established an entirely new pattern. The evolution of the law of constructive treason in England is thus of peculiar significance.

There was an obvious reason for making the underlying and basic treason that of compassing and imagining the death of the king rather than the actual killing of the king. The "king's personal, individual authority was the mainspring of the government"[11] and this would have been completely destroyed had it been necessary, in order to commit this species of treason, to put an end to the king's life. The provision to this effect, however, was clear and specific and not a matter of construction or extension.

The first step in the direction of construction apparently came when someone discovered that plotting to do an act which might possibly have the effect of injuring the king might be alleged as an act of compassing and imagining the death of the king, even though nothing could have been

[10] East, *Pleas of the Crown*, (Phila., 1806), Chapter II, sec. 21, p. 58. See also Foster, *Crown Cases* (London, 1792), Chapter II, sec. 8, p. 216. Foster also states that "Furnishing rebels or enemies with money, arms, ammunition or other necessaries will, *prima facie*, make a man a traitor," *supra*, Chapter II, sec. 8, p. 217.

[11] Stephen, *A General View of the Criminal Law of England* (London and Cambridge, 1863) p. 37.

further from the thought of the accused than the killing of the king. Any sort of giving of aid and comfort to the enemy could be said to have the possible effect of injuring the king. Thus it came about that the common form of indictment for treason charged the same overt acts as a treason of adhering to enemies, giving them aid and comfort, and at the same time as a treason of compassing and imagining the death of the king. In this way the treason of adhering to the king's enemies lost some of its meaning and distinction through its constant association with the treason of compassing and imagining the death of the king, a circumstance noted by Judge Learned Hand in *United States* v. *Robinson*, 259 Fed. 685 (D. C., S. D. N. Y., 1919), at p. 690.

This serves to explain the curious phenomenon that in the early 18th century the English judges held that there might be a treason of adhering to enemies, giving them aid and comfort, although no aid and comfort was given. Doubtless influenced by the treason of compassing and imagining, where plainly no fulfillment of the traitorous design was required, the English judges held that a mere attempt to give aid and comfort was sufficient.

As we shall see (*infra*, p. 18), this question was raised in *Rex* v. *Vaughan*, [1696] 13 How. St. Tr. 485.[12] The point was most frequently involved, however, in cases in which the accused had sent letters containing military information to the enemy, which letters were intercepted. In such cases the following statement of Lord Mansfield in *Rex* v. *Henson*, [1758] 19 How. St. Tr. 1341, 1344, is usually cited:

> "Letters of advice and correspondence, and intelligence to the enemy, to enable them to annoy us or defend themselves, written and sent, in order to be delivered to the enemy, are, though intercepted, overt acts of both these species of treason that have been men-

[12] All references to Howell's *State Trials* are to the octavo edition.

tioned [adhering and compassing]. And this was determined by all the judges of England, in Gregg's case: where the indictment (which I have seen) is much like the present indictment. The only doubt, there, arose from the letters of intelligence being intercepted and never delivered; but they held 'that that circumstance did not alter the case.'"

Why a mere attempt to aid the enemy should have been held to constitute the treason of rendering the enemy aid and comfort is far from clear. The question is sometimes dismissed in the cases with the statement that the accused did all that he could to aid the enemy.[13] But the reason generally given is that if treason consisted only of successfully aiding the enemy, such success might annihilate the only institution which could punish the offense.[14] It does not seem to have been apparent to the English judges, as it was to Chief Justice Marshall in *Ex Parte Bollman*, 4 Cranch 75, 125-127, 8 U. S. 75, 125-127, *infra*, pp. 31-32, that it lay within the power of the legislature to make crimes of offenses which were something short of treason, or, if this was apparent to them, it can only be said that the English judges were notoriously sympathetic to constructive extension of the law of treason.

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[13] For example, see *Rex* v. *O'Coigly, et al.*, [1798] 26, 27 How. St. Tr. 1191, 1195; see also Foster, *supra*, Chap. II, sec. 8, p. 217.

[14] For example, Lord Justice Chamberlain in *Rex* v. *Hart*, [1796] 26 How. St. Tr. 387, 415:

> "If nothing could be considered treason, which did not succeed, no man could be brought to punishment until the government of this country be subverted, and it would be then too late to call him to account for offences committed against a system which was annihilated by his exertions."

As for the reason for this doctrine in the case of sending a letter, Lord Chief Justice the Earl of Clonmell in *Rex* v. *Jackson*, [1794] 25 How. St. Tr. 783, 871, suggests that the obvious reason is that otherwise the letters would get into the hands of the enemy and be unavailable to the prosecution.

Finally, shortly after our Constitutional Convention, it was held in England that meeting with others and consulting or agreeing to do an act which if done would be an act of treason was itself an act of treason.[15]

We do not contend that there is any difference in the basic definition of "giving aid and comfort" to an enemy as understood by the English judges and by the members of the American Constitutional Convention. It meant to the English judges and to our founders as well, giving intelligence to the enemy, furnishing arms, ammunition, money or supplies and so on. In this sense the English precedents furnish guidance just as in the case of the meaning of the treason of "levying war."

What we do contend is that it was never the intention of the founders to adopt and integrate with our simple definition of treason, decisions extending the law by construction so as to cover attempts and abortive conspiracies.

So much for the general discussion of the English treason of adhering to the king's enemies. The specific acts constituting the treason will appear clearly when we consider the various cases in detail.

B. *The meaning of an overt act of the treason of adhering to enemies under the English Statute of Treasons, 25 Edward III (1351).*

While it seems to have been somewhat uncertain in English law to what treasons the words "and thereof be provably attainted by open deed by the people of their condi-

[15] *Rex v. Stone*, [1795] 25 How. St. Tr. 1155; *Rex v. Finney*, [1798] 26 How. St. Tr. 1019; *Rex v. O'Coigly, et al.*, [1798] 26 How. St. Tr. 1191; *Rex v. Henry and John Sheares*, [1798] 27 How. St. Tr. 255; *Rex v. McCann*, [1798] 27 How. St. Tr. 399; *Rex v. Burne*, [1798] 27 How. St. Tr. 455; *Rex v. Bond*, [1798] 27 How. St. Tr. 523.

tion" in 25 Edward III applied to,[16] it is certain that they applied to the treason of adhering to the king's enemies.

That only an act of treason as defined by us (*supra*, pp. 2, 3, 5) was originally meant to be a sufficient overt act of treason is manifest from the wording of 25 Edward III itself. The statute states "and thereof be provably attainted by open deed • • •." This can only mean that the treason insofar as it consists of an act must be proved by the overt act.[17] Foster [18] and East [19] state that the overt

[16] Some of the text writers state that the phrase refers to all the treasons which precede it. Hale, *Pleas of the Crown* (Ed. Wilson, Dublin, 1778), Chapter XIII, section IV, Vol. 1, p. 108; East, *supra*, Chapter II, sec. 54, Vol. I, p. 116. But it is doubtful that it applied to violation of the king's companion, etc. Coke seems to state that it applies only to the treasons of compassing the death of the king, etc., and adhering to his enemies, *supra*, Cap. I, sections 3, 4. In *Regina* v. *Purchase*, [1710]. 15 How. St. Tr. 651, it was held that no overt act need be alleged in an indictment for the treason of levying war, but that nevertheless the indictment must state the facts constituting the levying of war. See East, *supra*, Chapter II, sec. 54, Vol. I, pp. 116-117.

[17] Of this phrase, Coke states, in part, *supra*, Cap. 1, Section 12:

"(16) *Et de ceo provablement soit attaint per overt fait, per gents de lour condition.*] In this branch four things are to be observed, first this word [*provablement*] provably, that is upon direct and manifest proof not upon conjecturall presumptions, or inferences, or strains of wit; but upon good and sufficient proofe. And herein the adverb [provablement] provably, hath of great force, and signifieth a direct and plain proof, which word the king, the lords, and the commons in parliament did use, for that the offence was so hainous, and was so heavily, and severely punished, as none other the like and therefore the offender must provably be attainted, which words are as forcible, as upon direct and manifest proof. Note, the word is not (probably) for then *commune argumentum* might have served, but the word is [*provably,*] be attainted. • • • 3. *Per overt fait,*] *per apertum factum.* This doth also strengthen the former exposition of the word (provablement,) that it must be provably, by an open act, which must be manifestly proved."

[18] "The words of the statute descriptive of the offence must be strictly pursued in every indictment for this species of treason [compassing the king's death]. It must charge, that the defendant did traiterously *compass* and *imagine* &c., and then go on and charge the several overt acts as the means employed by the defendant for executing his traiterous purposes. For the compassing is considered as the treason, the overt

act is the means employed to accomplish the treason. For the reason that the overt act went to the heart of the charge against which the accused must make his defense, the statute 7 William III, c. 3, sec. 8 (1695), provided especially that "no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever."[20] It is stated in Halsbury's, *The Laws of England*, Vol. 9, p. 456, that "The treason alleged must be proved by overt acts, and the overt acts upon which it is intended to rely must be expressly alleged in the indictment, and must be proved, and no evidence is admissible of any overt act that is not so alleged unless it affords direct proof of any of the overt acts that are laid."

Blackstone says of the treason of adhering to the king's enemies, "This must likewise be proved by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, and the like" (see petitioner's first brief, p. 25). These, it will be remembered, are the acts which Hawkins and Foster stated to constitute the treason of adhering to the king's enemies (see *supra*, pp. 8, 9 fn.).

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acts as the means made use of to effectuate the intentions and imaginations of the heart. * * *" Foster, *supra*, Chapter I, sec. 1, pp. 193 194.

[19] "In every indictment for high treason upon the st. 25 Ed. 3, for compassing the death of the king, or of such of his family as are therein named, or for levying war, or adhering to his enemies, the particular species of treason must be charged in the very terms of the statute, being a declaratory law, as the substantial offence, and then some overt act must be laid as the means made use of to effectuate the traitorous purpose." East, *supra*, Chap. II, sec. 54, Vol. I, p. 116.

[20] East states that while this was generally the common law rule "some high authorities did seem to countenance a contrary doctrine; which justifies the caution and wisdom of parliament in securing the observance of the rule by a legislative provision." *Supra*, Chapter II, sec. 56, Vol. I, p. 121.

The first fully reported case petitioner finds of the treason of adhering to the king's enemies is *Lord Preston's* case, [1691] 12 How. St. Tr. 646, which was considered at some length in the first briefs submitted to this Court. It will be remembered that at a time when England was at war with France, Lord Preston was apprehended in a boat on its way to France, and there was found in his custody, papers, some of them in his handwriting and bearing his seal, informing the French how they could best invade England. All it was proved that Lord Preston did in the County of Middlesex, where the indictment was laid, was to board a wherry in order to get out to the ship that was to take him to France. On his trial Lord Preston objected that no overt act had been proved in Middlesex. But Lord Chief Justice Holt overruled the objection, and in his charge to the jury spoke as follows:

> "Ay, but gentlemen, give me leave to tell you, if you are satisfied upon this evidence that my lord was privy to this design, contained in these papers, and was going with them into France, there to excite an invasion of the kingdom, to depose the king and queen, and make use of the papers to that end, then every step he took in order to it, is high treason, wherever he went; his taking water at Surrey stairs in the county of Middlesex, will be as much high-treason, as the going aship-board in Surrey, or being found on ship-board in Kent, where the papers were taken."

In its first brief respondent claimed that this case supports its contention that an innocent act, as distinguished from an act which is itself treason if done with the requisite intent, could be an overt act of treason. Petitioner took the position that the case stood for the proposition that if the jury found that a proper overt act of treason had been proved, it might then, and only then, consider proof of any

steps taken in preparation for that act as proof of an overt act of treason. Petitioner cited Holdsworth's comment on the case:

> "It comes to this—every act, however remotely connected with an overt act of compassing the king's death, is itself an overt act." Holdsworth, *History of English Law*, Vol. 8, p. 317.

The indictment tends to confirm petitioner's contention. The third overt act of adhering to the king's enemies reads as follows:

> "And that your the said sir Richard Grahme, John Ashton, and Edmund Elliot, during the war aforesaid, to wit, the aforesaid 30th day of December now passed, at the parish of St. Clement Danes, in the county aforesaid, concerning, and for the same your treasons and traiterous adherings and purposes aforesaid to execute and fulfil, maliciously, traiterously, and advisedly, then and there did hire and prepare, and then and there did cause and procure to be hired and prepared a certain boat, and one man to the jurors unknown, you the said sir Richard Grahme, John Ashton, and Edmund Elliot, from thence to and into the ship aforesaid, by you as aforesaid hired and prepared to carry and convey; and that you the said sir Richard Grahme, John Ashton, and Edmund Elliot, maliciously and traiterously into the same boat, then and there did enter, and yourselves from thence secretly in and by the same boat unto and into the same ship, then and there did cause and procure to be carried, in prosecution of the adhering aforesaid. And you the said sir Richard Grahme, John Ashton, and Edmund Elliot, then and there with the same traiterous letters, notes, memorandums, and instructions in writing, in your custody and possession being, during the war aforesaid, to wit, the same day and year, in and with the ship aforesaid did sail, and depart towards the aforesaid kingdom of France, to the intent the same traiterous letters, notes, memorandums, and instructions in writing, in parts beyond the seas, to the said enemies of our

said lord and lady, the king and queen that now are, to deliver, concerning and for aid, intelligence, and council, by you the said sir Richard Grahme, John Ashton, and Edmund Elliot, to the same enemies of our said lord and lady, the king and queen that now are, to give and yield, during the war aforesaid, against the duty of your allegience, against the peace of our said sovereign lord and lady, the king and queen that now are, their crown and dignity, and against the form of the statute in that case made and provided."

In this overt act it is alleged that Lord Preston departed on the ship towards France carrying with him the traitorous letters, etc. This, according to English law, was an act of treason. In the same overt act it is alleged that Lord Preston entered the wherry for the purpose of boarding the ship which was to take him to France. Thus the act of boarding the wherry is alleged to have been preparatory to the act of treason.

The next case is *Rex* v. *Vaughan*, [1696] 13 How. St. Tr. 485. The indictment charged Captain Vaughan with the treasons of levying war against the king and adhering to his enemies, although the count principally relied upon was that of adhering to the king's enemies. Vaughan had accepted a commission from the French king to command a small ship of war, or barge, called the Loyal Clencarty. This barge was manned by a number of foreigners including fifteen Frenchmen; it was filled with arms and ammunition and a large quantity of hand grenades, such as were used to start fires on enemy vessels. Captain Vaughan manoeuvered his barge around one of the British vessels of war, with the evident intent of boarding her; the following day the British vessel gave chase and Vaughan and his men together with the barge and its contents were captured as they tried to get away.

One of the overt acts of adhering to the king's enemies, giving them aid and comfort, was the charge of "cruising to several maritime places within the jurisdiction aforesaid,

by force and arms to take the ships, goods and money of our said lord the king and his subjects." The Latin version of the indictment, which appears in 13 How. St. Tr. pp. 490-1, shows that the charge was not merely cruising but cruising "with the aforesaid enemies of our said lord the king, in the aforesaid small ship of war, called the Loyal Clencarty." The indictment as a whole makes it perfectly evident that no innocent interpretation could possibly be given to the presence of this French ship of war in English waters, filled with munitions of war and Frenchmen armed to the teeth.

Captain Vaughan had admitted that he came to burn the king's ships and the French commission giving him command of the vessel was spread upon the record in full (pp. 535-6). The defense in substance was that Vaughan was a Frenchman but the evidence that he was an Irishman was amply sufficient to justify the submission of this question of fact to the jury.

The point raised by counsel was that the overt act of mere cruising was insufficient as there was no charge nor any proof that any of the king's ships had been boarded, seized or burned.

While the case is sometimes cited for the proposition that the treasonable design need not have been successfully accomplished to constitute treason, a careful examination of the full report shows that the point was not necessarily involved as it seems plain that there is an adherence to the king's enemies, giving them aid and comfort, when an Englishman accepts a commission to command a French war vessel in time of war and is found in actual command of the vessel and of certain armed enemy subjects in waters under the jurisdiction of the English admiralty.

The comment of one of the Lord Justices on this subject seems conclusive (pp. 532-3):

"L. C. J. *Treby*. The indictment is laid for adhering to, and comforting and aiding the king's enemies. You would take that to be capable to be construed adhering to the king's enemies in other respects; but I take it to be a reasonable construction of the indictment, to be adhering to the king's enemies in their enmity. What is the duty of every subject? It is to fight with, subdue, and weaken the king's enemies; and contrary to this, if he confederate with, and strengthen the king's enemies, he expressly contradicts this duty of his allegiance, and is guilty of this treason of adhering to them. But then you say here is no aiding unless there were something done, some act of hostility. Now here is going aboard with an intention to do such acts; and is not that comforting and aiding? Certainly it is. Is not the French king comforted and aided, when he has got so many English subjects to go a cruising upon our ships? Suppose they man his whole fleet, or a considerable part of it; is not that aiding? If they go and enter themselves into a regiment, list themselves and march, though they do not come to a battle, this is helping and encouraging; such things give the enemy heart and courage to go on with the war; or else it may be, the French king would come to good terms of peace. It is certainly aiding and comforting of them to go and accept a commission, and enter into their ships of war, and list themselves, and go out in order to destroy their fellow subjects, and ruin the king's ships; these are actings of an hostile nature. And if this be not adhering, &c. it may as well be said, that if the same person had made an attack upon our ships, and miscarried in it, that had not been so neither; because that in an unprosperous attempt there is nothing done that gives aid or comfort to the enemy. And after this kind of reasoning they will not be guilty, till they have success; and if they have success enough, it will be too late to question them."

The further statement of Lord Chief Justice Treby at page 498, relative to overt acts is also interesting:

> "Nevertheless, I think an overt act ought to be alleged in an indictment of treason for adhering to the king's enemies, giving them aid and comfort. And the overt act or acts, in this case, ought to be the particular actions, means, or manner by which the aid and comfort was given."

The cases of *Rex* v. *Freind*, [1696] 13 How. St. Tr. 1; *Rex* v. *Parkyns*, [1696] 13 How. St. Tr. 63, and *Rex* v. *Cook*, [1696] 13 How. St. Tr. 311, while containing allegations of adhering to the enemy, are not helpful. The same overt acts are alleged for the treasons of compassing the king's death and adhering to his enemies, and in one count, and it is impossible to know what acts were relied on for the respective treasons. In *Rex* v. *Freind* and *Rex* v. *Parkyns* Lord Chief Justice Holt submitted only the treason of compassing the king's death to the jury. In *Rex* v. *Cook*, Lord Chief Justice Treby, in summing up to the jury, mentions that the accused is indicted for two types of treason. But after enumerating the overt acts he states only that they are proper overt acts of compassing the king's death.

The next case is *Regina* v. *Gregg*, [1708] 14 How. St. Tr. 1371. The indictment is not set forth in the reports, but the following statement appears at pp. 1371-1375:

> "The Post-master of Brussels discovered a correspondence between Mr. Secretary Harley's office and the French, and communicated his knowledge to the government here; whereupon Mr. William Gregg, a clerk in that office, was taken into custody of a messenger, and, after several examinations before the counsel, was committed to Newgate, and on the 19th of January was indicted of high treason for compassing the death of the queen, and also for adhering to her enemies. The indictment imported, That he had sent letters to Monsieur Chamillard, one of the French king's prime ministers, particularly one dated the 28th of November last, and others, wherein were en-

closed the proceedings of both Houses of Parliament, in relation to the augmentation of our forces; also a copy of a letter from the queen to the emperor, and copies of private business sent to the duke of Savoy,' &c. To which indictment Gregg pleaded Guilty; and the recorder pronounced sentence of death upon him."

The next case is *Rex* v. *Hensey*, [1758] 19 How. St. Tr. 1341.[21] Dr. Hensey was indicted for the treasons of compassing the king's death and adhering to his enemies at a time when England was at war with France. Again the indictment is not set forth in the reports, but from the report of Lord Mansfield's statement at the close of the case (pp. 1346-1348) it is evident that the overt act consisted of sending letters containing information concerning the English army and navy, and government finance, to the enemy in France. The letters were intercepted.

The next case is *Rex* v. *De La Motte*, [1781] 21 How. St. Tr. 687. De La Motte, a French subject, was indicted, and in separate counts, for the treasons of compassing and imagining the death of the king and adhering to his enemies. The overt acts are chiefly the usual ones of sending military information to the French, which were held to be sufficient overt acts of adhering to enemies in the *Gregg* case and the *Hensey* case just above referred to.

The only other English case which petitioner has found of the treason of adhering to enemies prior to the American Constitutional Convention is *Rex* v. *Tyrie*, [1782] 21 How. St. Tr. 815. Tyrie was indicted for the treasons of compassing and imagining the death of the king, and adhering to his enemies, at a time when England was at war with France. The overt acts alleged in his indictment are

[21] While the Solicitor-General in *Rex* v. *Townley*, [1746] 18 How. St. Tr. 330, states at p. 346 that the treason of adhering is involved, the indictment (pp. 333-334) does not bear him out.

substantially the same as those alleged in *De La Motte's* case.

As for the English cases of the treason of adhering to the king's enemies, tried after the American Constitutional Convention,[22] they fall within the scope of those we have already discussed. In practically all these cases the same overt acts are alleged for the treason of adhering and also for the treason of compassing and imagining. The only development of any significance is the further development of the law, as above set forth, to the effect that meeting with others and consulting or agreeing to do an act, which if done would be an act of treason, was itself an act of treason. (See footnote 15, *supra*.)

One of these cases, *Rex* v. *Maclane*, [1797] 26 How. St. Tr. 721, was relied upon by respondent and discussed in the Government's first brief at pages 35, 40 and 48. There were numerous overt acts which were obviously sufficient, including raising men to levy war against the king, conveying arms and ammunition into the province for the purpose of waging war against the king and so on, as pointed out in our reply brief, page 5. The Court did charge that it was not necessary for conviction to establish that defendant succeeded in his design. This ruling

[22] *Rex* v. *Jackson*, [1794] 25 How. St. Tr. 783; *Rex* v. *Stone*, [1795] 25 How. St. Tr. 1155; *Rex* v. *Weldon*, [1795] 26 How. St. Tr. 226; *Rex* v. *Maguire*, [1795] 26 How. St. Tr. 293; *Rex* v. *Leary*, [1795] 26 How. St. Tr. 295; *Rex* v. *Kennedy*, [1796] 26 How. St. Tr. 352; *Rex* v. *Hart*, [1796] 26 How. St. Tr. 387; *Rex* v. *Maclane*, [1797] 26 How. St. Tr. 721; *Rex* v. *Finney*, [1798] 26 How. St. Tr. 1019; *Rex* v. *O'Coigly, O'Connor, Binns, Allen and Leary*, [1798] 26 How. St. Tr. 1191 (cont. in Vol. 27); *Rex* v. *Henry and John Sheares*, [1798] 27 How. St. Tr. 255; *Rex* v. *McCann*, [1798] 27 How. St. Tr. 399; *Rex* v. *Byrne*, [1798] 27 How. St. Tr. 455; *Rex* v. *Bond*, [1798] 27 How. St. Tr. 523; *Rex* v. *Lone*, [1798] 27 How. St. Tr. 613; *Rex* v. *Emmet*, [1803] 28 How. St. Tr. 1097; *Rex* v. *Lynch*, [1903] 20 Cox C. C. 468; *Rex* v. *Ahlers*, [1915] 1 K. B. 616; *Rex* v. *Casement*, [1917] 1 K. B. 98—See *The Trial of Sir Roger Casement* (Ed. by Knott, 1917).

was supported by other English decisions prior to the American Constitutional Convention and, as indicated in the footnote on page 5 of our reply brief, it was our belief at the time of the first argument of this case that these English cases were sufficiently binding as precedents.

As indicated in the preliminary portion of this brief, further study and reflection has convinced us that the elimination of the English treason of compassing and imagining and the entirely new pattern of the definition of treason in our Constitution makes it extremely doubtful that the founders ever intended that a mere attempt or abortive conspiracy should be sufficient to establish the treason of adhering to enemies, giving them aid and comfort, despite the English authorities to the contrary and one or two American dicta,[23] none of which bear evidence of the serious consideration which the point seems to deserve.

What is the modern English view of an overt act of the treason of adhering to enemies, giving them aid and comfort? We have been unable to find any guidance except such as appears in *Rex* v. *Casement*, [1917] 1 K. B. 98 (See the *Trial of Sir Roger Casement*, ed. by Knott, 1917). As stated in petitioner's first brief, p. 30, the overt acts charged were all of such a character as, in and of themselves, to import a treasonable purpose. While respondent states that the definition of overt acts as there charged by Lord Chief Justice Reading is "equivocal and unilluminating" (respondent's first brief, p. 49), we do not think this characterization is justified. Judge Learned Hand, who quoted this definition in *United States* v. *Robinson*, 259 Fed. 685 (D. C., S. D. N. Y., 1919) hereinafter referred to, (*infra*, p. 36), found it to be most in accord with his under-

[23] *United States* v. *Pryor*, 27 Fed. Cas. No. 16,096 (C. C., D. Pa., 1814). *United States* v. *Greathouse, et al.*, 26 Fed. Cas. No. 15,254 (C. C., N. D. Calif., 1863).

standing of the law. Lord Chief Justice Reading charged as follows:

> "Overt acts are such acts as manifest a criminal intention and tend toward the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled."

We have been unable to find any published records of treason prosecutions in England during the present war; and it is our information that such prosecutions as have taken place have been pursuant to the terms of a variety of statutory provisions such as are contained in Title 50 of the *United States Code*, Chapter 4, which defines and provides for the punishment of numerous acts under the heading of "Espionage". This chapter, and particularly Section 32 thereof, is hereinafter referred to in connection with our argument addressed to overt act 10 (*infra*, p. 46).

C. *The meaning of the treason of adhering to enemies, and overt acts thereof, in the American States prior to the Constitutional Convention.*

The crime of treason is not defined in any of the constitutions enacted by the various American States between the time of the Declaration of Independence and the meeting of the Constitutional Convention of the United States.[24] Nor is treason defined in the Articles of Confederation, where the only reference to it is the provision in Article IV providing for the extradition of one guilty of or charged with treason.

But there was in this period a very significant enactment. On February 11, 1777, the Assembly of the State of Penn-

[24] See F. N. Thorpe, *The Federal and State Constitutions*, (Washington, 1909). Some of them, like the Massachusetts Constitution of 1780, had a provision that no subject ought to be declared guilty of treason by the legislature. See Thorpe, *supra*, Vol. 3, p. 1892.

sylvania passed a statute concerning treason. That statute reads as follows:[25]

AN ACT DECLARING WHAT SHALL BE TREASON AND WHAT OTHER CRIMES AND PRACTICES AGAINST THE STATE SHALL BE MISPRISON OF TREASON.

(Section I, P.L.) Whereas it is absolutely necessary for the safety of every state to prevent as much as possible all treasonable and dangerous practices that may be carried on by the internal enemies thereof and to provide punishments in some degree adequate thereto, in order to deter all persons from the perpetration of such horrid and dangerous crimes:

Therefore:

[Section I] (Section II, P.L.) Be it enacted, and it is hereby enacted by the Representatives of the Freemen of the Commonwealth of Pennsylvania in General Assembly met, and by the authority of the same, That all and every person and persons (except prisoners of war) now inhabiting, residing or sojourning within the limits of the state of Pennsylvania or that shall voluntarily come into the same hereafter to inhabit, reside or sojourn, do owe and shall pay allegiance to the state of Pennsylvania.

[Section II] (Section III, P.L.) And be it further enacted by the authority aforesaid, That if any person or persons belonging to or residing within this state and under the protection of its laws shall take a commission or commissions from the King of Great Britain, or any under his authority or other the enemies of this state or the United States of America, or who shall levy war against the state or government thereof, *or knowingly and willingly shall aid or assist any enemies at open war against this state, or the United States of America, by joining their armies or by enlisting or procuring or persuading others to enlist for that purpose, or by furnishing such enemies with arms or*

[25] See *The Statutes at Large of Pennsylvania* [1776-1777], 45-47.

*ammunition, provision or any other article or articles for their aid or comfort, or by carrying on a traitorous correspondence with them, or shall form or be anywise concerned in forming any combination, plot or conspiracy for betraying this state or the United States of America into the hands or power of any foreign enemy; or shall give or send any intelligence to the enemies of this state for that purpose, every person so offending and being thereof legally convicted by the evidence of two sufficient witnesses in any court of oyer and terminer shall be adjudged [guilty] of high treason and shall suffer death*, and his or her estate shall be and is hereby declared to be forfeited to the commonwealth, except such parts thereof as the judges of the court wherein such conviction may be shall order and appropriate to the support of such traitor's children or wife and children (if any) as to them may appear sufficient until the same shall be otherwise regulated by act of general assembly.

[Section III] (Section IV, P. L.) And be it further enacted by the authority aforesaid, That if any person or persons within this state shall attempt to convey intelligence to the enemies of this state or the United States of America, or by publicly and deliberately speaking or writing against our public defense, or shall maliciously and advisedly endeavor to excite the people to resist the government of this commonwealth or persuade them to return to a dependence upon the crown of Great Britain, or shall maliciously and advisedly terrify or discourage the people from enlisting into the service of the commonwealth, or shall stir up, excite or raise tumults, disorders or insurrections in the state or dispose them to favor the enemy, or oppose and endeavor to prevent the measures carrying on in support of the freedom and independence of the said United States, every such person being thereof legally convicted by the evidence of two or more creditable witnesses in any court of general quarter sessions shall be adjudged guilty of misprison of treason and shall suffer imprisonment during the present war, and

forfeit to the commonwealth one-half of his or her lands and tenements, goods and chattels.

[Section IV] (Section V, P. L.) And be it further enacted by the authority aforesaid; That all offenses by this act declared misprison of treason shall be cognizable before any justice of the peace of the city or county where the offense was committed or where the offender can be found, and every justice of the peace within this state on complaint to him made on oath or affirmation of one or more credible person or persons shall cause such offender to come before him and enter into a recognizance with one or more sufficient surety or sureties to be and appear at the next court of general quarter sessions for the said city or county and abide the judgment of the court, and in the meantime to be of the peace and good behavior toward all people in the state, and for want of such surety the said justice shall commit such offender to the common gaol of the said city or county. And all persons charged on oath or affirmation with any crime or crimes by this act declared to be treason against the state shall be dealt with and proceeded against as in other capital crimes are [sic] [is] by law directed." [Italics supplied.]

This statute, in so far as it concerns the treason of adhering to enemies, is of great interest and significance. In the first place, it defines specifically those acts which when done with traitorous intent will constitute treason. Other enumerated acts are made misprision of treason. Apparently only successful acts were intended to constitute treason since an attempt to convey intelligence to the enemy, an act of treason in England, is here made misprision of treason. Here then the crime of the treason of adhering to enemies is made more definite and certain and it is explicitly limited to those specific acts of adhering which plainly give aid and comfort to the enemy and which are deemed most threatening to the safety and existence of the state.

More significant still is the provision with respect to proof of the crime. The acts constituting the treason of adhering to enemies are enumerated, and then the statute provides: "every person so offending and being thereof legally convicted by the evidence of two sufficient witnesses in any court of oyer and terminer shall be adjudged [guilty] of high treason and shall suffer death * * *." The term "overt act" is omitted, and instead it is provided that the accused can be convicted only on the testimony of two witnesses to the act which constitutes the treason. This was not an attempt to change the English requirement of proof of an overt act in treason. While the Pennsylvania statute omits the term "overt act," it restates the overt act requirement in accordance with the long-standing English understanding of the term, namely, that it is the act of treason that must be proved by two witnesses. In the cases tried in Pennsylvania under this statute reference is continually made to "overt acts."[26]

This then was the first American reaction to the English law of treason; and it was not a short-lived one since the present statute of the State of Tennessee with respect to treason is copied practically verbatim from the Pennsylvania Statute of 1777.[27]

D. *The meaning of the treason of adhering to enemies, and overt acts thereof, under the Constitution of the United States.*

The Constitutional provision with respect to treason, Article III, Section 3, reads as follows:

> "Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the

[26] *Respublica* v. *Malin*, 1 Dall. 33 (1778); *Respublica* v. *Carlisle*, 1 Dall. 35 (1778); *Respublica* v. *Roberts*, 1 Dall. 39 (1778).

[27] Williams, *Tennessee Code Annotated*, § 11004.

Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

The proceedings at the Constitutional Convention concerning the law of treason were referred to in petitioner's first brief at page 22, and in respondent's first brief at pages 37, 38.

Because the Constitutional provision adopts the English statement of the treason of adhering to enemies, and includes the overt act requirement, the first question is whether, and to what extent, the Constitutional Convention intended to adopt the English precedents defining these terms. It is obvious that the Convention, like the Pennsylvania Assembly, was not well disposed to the English law of treason. Of the numerous treasons current in England it retained but two. Nor did it adopt the English law with respect to proof of the overt act. The statute of 7 William III. (1695) provided, and it had been settled law prior to the statute,[28] that one accused of treason could be convicted on the testimony of one witness to one overt act and one witness to another overt act of the same treason. The Constitutional provision is that there must be two witnesses to the same overt act. Again, in England it was clear that there were no accessories in treason; all were principals.[29] That this could be so under the Constitution is doubtful.[30] Furthermore, the Convention made it impossible that treason should be punished as heavily as it was in England by providing that forfeiture and corruption of blood should not

[28] See East, *supra*, Vol. I, Chap. II, sec. 65.

[29] East, *supra*, Vol. I, Chap. II, sec. 35.

[30] See Chief Justice Marshall in *U. S. v. Burr*, 25 Fed. Cas. No. 14,693 (C. C., D. Va. 1807), p. 161.

be a consequence of attainder of treason except during the life of the person attainted. Finally, by virtue of defining treason in the Constitution, the Convention placed revision of that definition beyond the scope of the ordinary legislative process. In England, of course, the crime could in anywise be regulated by act of Parliament.

**Where treason was later defined in the State constitutions, the provision of the Federal Constitution was generally copied,[31] indicating thorough agreement to avoid the English experience.**

[31] The definition of treason, and the method of proof thereof, provided for in the Federal Constitution was copied in the following constitutions (page references are to Thorpe, *supra*): Alabama Constitution of 1819, p. 108; Arkansas Constitution of 1836, p. 284; Colorado Constitution of 1876, p. 467; Connecticut Constitution of 1818, p. 536; Delaware Constitution of 1792, p. 574; Florida Constitution of 1838, p. 680; Georgia Constitution of 1868, p. 824; Idaho Constitution of 1889, p. 929; Kansas Constitution of 1857, p. 1215; Kentucky Constitution of 1792, p. 1272; Louisiana Constitution of 1812, p. 1388; Maine Constitution of 1819, p. 1648; Michigan Constitution of 1835, pp. 1931-1932; Minnesota Constitution of 1857, p. 1992; Mississippi Constitution of 1817, p. 2044; Missouri Constitution of 1820, p. 2164; Montana Constitution of 1889, p. 2302; Nebraska Constitution of 1866-1867, p. 2350; New Jersey Constitution of 1844, p. 2600; North Carolina Constitution of 1868, p. 2816; Oklahoma Constitution of 1907, p. 4274; Oregon Constitution of 1857, p. 2999; Texas Constitution of 1845, p. 3560; West Virginia Constitution of 1861-1863, p. 4016, Wisconsin Constitution of 1848, p. 4078;

In a number of state constitutions, treason is defined as levying war against the state, "or adhering to its enemies, or in giving them aid and comfort." California Constitution of 1849, p. 392; Indiana Constitution of 1816, p. 1070; Iowa Constitution of 1846, p. 1124; Nevada Constitution of 1864, p. 2404; North Dakota Constitution of 1889, p. 2856; South Dakota Constitution of 1889, p. 3371; Utah Constitution of 1895, p. 3704; Washington Constitution of 1889, p. 3975; Wyoming Constitution of 1889, p. 4119. In the South Carolina Constitution of 1895, the words "adhering to its enemies" are omitted, but giving aid and comfort to the enemy is made treason.

States having no constitutional provision concerning treason have statutes defining the crime, generally in the language of the Federal Constitution. By statute in New Hampshire and Vermont, conspiring to levy war is treason. The New York statute makes treasonable a combination of two or more persons to usurp or overthrow the government by force, shown by a forcible attempt. Virginia has a somewhat similar provision, but it does not require a combination. New York does not require proof of an overt act by two witnesses.

While Chief Justice Marshall held in *United States* v. *Burr*, 25 Fed. Cas. No. 14,693 (C. C., D. Va. 1807) at p. 159, that the English precedents were relevant in defining "levying war" under the Constitution, in *Ex Parte Bollman*, 4 Cranch 75, 8 U. S. 75 (1807), he indicated strongly that a strict interpretation of the Constitutional provision was called for by the American experience. He stated, at 4 Cranch 125-126, 8 U. S. 125-126:

> "As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.
>
> To prevent the possibility of those calamities which result from the extension of treason to offences of minor importance, that great fundamental law which defines and limits the various departments of our government has given a rule on the subject both to the legislature and the courts of America, which neither can be permitted to transcend."

and further at 126-127:

> "Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no

resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is therefore more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."

The numerous Federal cases dealing with the treason of levying war [32] are of help in our problem only insofar as they treat the meaning of "overt act."

In the *Case of Fries*, 9 Fed. Cas. No. 5,126 (C. C., D. Pa., 1799), where the treason of levying war was involved, Judge Peters stated at p. 916:

"I think the overt act and the intention constitute the treason, for without the intention the treason is not complete."

And Justice Chase, in the second trial of the same case, stated at p. 932:

"If either of the three overt acts (or open deeds) stated in the indictment, is proved to your satisfaction, the Court are of opinion, that it is sufficient to maintain the indictment; for the Court are of opinion that every overt act is treasonable."

[32] *U. S.* v. *Vigol*, 2 Dall. 346 (C. C., D. Pa., 1795), *U. S.* v. *Mitchell*, 2 Dall. 348 (C. C., D. Pa., 1795), *Case of Fries*, 9 Fed. Cas. No. 5,126 (C. C., D. Pa., 1799), *U. S.* v. *Burr*, 25 Fed. Cas. Nos. 14,692a-k (inc.), *U. S.* v. *Cathcart*, 25 Fed. Cas. No. 14,756, (C. C. Ohio, 1864) *U. S.* v. *Greathouse, et al.*, 26 Fed. Cas. No. 15,254 (C. C., N. D. Calif., 1863), *U. S.* v. *Hoxie*, 26 Fed. Cas. No. 15,407 (C. C., D. Vt., 1808), *U. S.* v. *Hanway*, 26 Fed. Cas. No. 15,299 (C. C., E. D. Pa., 1851), *U. S.* v. *Greiner*, 26 Fed. Cas. No. 15,262 (D. C., E. D. Pa., 1861), *U. S.* v. *Rucker*, 27 Fed. Cas. No. 16,203 (C. C., W. D. Tenn., 1866).

Most instructive, however, is the comment of Chief Justice Marshall in charging the jury in *United States* v. *Burr*, 25 Fed. Cas. No. 14,693 (C. C., D. Va., 1807) where he stated, in part, as follows, at p. 172:

> "The whole treason laid in this indictment is the levying war in Blemmerhassett's Island; and the whole question to which the inquiry of the court is now directed is whether the prisoner was legally present at that fact. I say this is the whole question; because the prisoner can only be convicted on the overt act laid in the indictment. With respect to this prosecution, it is as if no other overt act existed. If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged. *If is evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact.* The counsel for the prosecution have charged those engaged in defence with considering the overt act as treason, whereas it ought to be considered solely as the evidence of the treason; but the counsel for the prosecution seem themselves not to have sufficiently adverted to this clear principle: *that although the overt act may not be itself the treason, it is the sole act of that treason which can produce conviction.* * * *" (Italics supplied).

This statement supports petitioner's contention that the overt act must be an act of treason. Chief Justice Marshall states that the crime of treason consists of the overt act,[33] and that although there may have been acts of treason other than those alleged in the indictment, the overt act alleged is the only act of treason on which a conviction can be based.

The first case of the treason of adhering to enemies arising under the United States Constitution was *United States*

[33] He states this definitely in *U. S.* v. *Burr*, 25 Fed. Cas. No. 14,692a at p. 13:

> "*This high crime consists of overt acts*, which must be proved by two witnesses, or by the confession of the party in open court." (Italics supplied).

v. *Pryor*, 27 Fed. Cas. No. 16,096 (C. C., D. Pa., 1814), which was considered in respondent's first brief at page 51, and in petitioner's reply brief at pages 6, 7. The Court there charged the jury that progressing from an English boat to the shore with the intention of procuring provisions for the use of the enemy was not an overt act of treason. The Court did, however, state that if the intent were to secure provisions for the enemy, by uniting with him in acts of hostility against the United States or its citizens, then progressing towards the shore would be an overt act of adhering to the enemy. There is no apparent reason why, with respect to the treason of adhering, the intent to unite with enemies in acts of hostility against the United States or its citizens should be thus decisive. It would, of course, be decisive if the indictment concerned the treason of levying war. In any event, as stated in our reply brief, the jury gave its verdict of not guilty without leaving the bar.

*United States* v. *Lee*, 26 Fed. Cas. No. 15,584 (C. C., D. C., 1814) was discussed in petitioner's first brief at page 34 and in respondent's first brief at page 51. The report states that the indictment charged the defendant with supplying the enemy with fruit and melons, showing them the channel of the river Potomac, and informing them of the situation of the troops of the United States. All these are acts of treason. Apparently, however, the evidence did not fully sustain the allegations. According to the defendant's counsel the evidence showed only a purchase of melons and an inquiry about the militia; according to government counsel the evidence showed a purchase of melons, and a collecting of information, and an attempt to carry these to the British. This conflict was not resolved by the Court, but the jury, "after retiring a few minutes," found the defendant not guilty.

The next case is *United States* v. *Hodges*, 26 Fed. Cas. No. 15,374 (C. C., D. Md., 1815). It appeared that some

persons of the town of Marlborough captured some British soldiers and made them prisoners. A general in the British army demanded that the prisoners be returned and threatened to burn the town and hold the women and children as hostages. The accused returned the prisoners to the British. On his plea that his intent was not traitorous, the jury found the defendant not guilty.

Chronologically this is the proper place to note Greenleaf's definition of overt acts of adhering found in his *Treatise on the Law of Evidence* (Boston, 1899), Vol. III, §244, p. 232:

> "The charge of treason by *adhering to the public enemies, giving them aid and comfort*, may be proved by evidence of any overt acts, stated in the indictment, done with that intent, and tending to that end: such as joining the enemy; liberating prisoners taken from him; holding a fortress against the State, in order to assist the enemy; furnishing him with provisions, intelligence, or munitions of war; destroying public stores in order to aid him; surrendering a fortress to him; or the like."

The next case[24] is *United States* v. *Werner*, 247 Fed. 708 (D. C., E. D. Pa., 1918), a hearing on defendant's demurrer to an indictment for the treason of adhering, alleging as an overt act the publication of a newspaper containing certain utterances. The question of law was whether printed words could constitute an overt act of treason. The Court refused to decide this question, holding that a decision could be made only after the evidence was in.

The next case is *United States* v. *Fricke*, 259 Fed. 673 (D. C., S. D. N. Y., 1919), which was discussed in petitioner's first brief at page 34 and in respondent's first brief at

[24] The treason of adhering was apparently alleged in the indictment in *U. S.* v. *Greathouse, et al.*, 26 Fed. Cas. No. 15,254 (C. C., N. D., Calif., 1863), but the court instructed the jury to disregard this allegation and to consider only the allegation of levying war.

pages 31, 50, 61 and 72. The official report merely reproduces the charge to the jury of Mayer, D. J. As defendant was acquitted and overt act 2, which charged the delivery of $6000 to an enemy spy, is clearly an act of treason, further discussion seems unnecessary. The case is relied upon by respondent simply because Judge Mayer made the observation that an overt act "in itself may be a perfectly innocent act standing by itself." That there was some divergence in view between Judge Mayer and Judge Learned Hand, whose opinion in the *Robinson* case we are about to discuss, may be conceded.

The next case is *United States* v. *Robinson*, 259 Fed. 685 (D. C., S. D. N. Y., 1919). This case was discussed in petitioner's first brief at page 31 and in respondent's first brief at pages 24, 50, 51 and 72. The question directly in issue in this case was the meaning of the two witness requirement. By way of *dictum*, however, Judge Learned Hand commented on the sufficiency of the overt acts alleged in the indictment, at page 690:

> "Nevertheless a question may indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent. It is true that in prosecutions for conspiracy under our federal statute it is well settled that any step in performance of the conspiracy is enough, though it is innocent except for its relation to the agreement. I doubt very much whether that rule has any application to the case of treason, where the requirement affected the character of the pleading and proof, rather than recorded a season of repentance before the crime should be complete. Lord Reading in his charge in Casement's Case uses language which accords with my understanding:
>
> 'Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the

criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled.

Therefore I have the gravest doubt of the sufficiency of the first and second overt acts of the first count and of those of the second count, which consist of acts that do not openly manifest any treason. Their traitorous character depends upon a covert design, and as such it is difficult for me to see how they can conform to the requirements."

The alleged overt acts of the first count concerning the sufficiency of which Judge Hand had grave doubt may be paraphrased as follows:

1. Sailing from Halifax with intent to convey to the German Government original messages before described with intent to obtain from those officials replies to be conveyed to certain named persons in furtherance of Germany's prosecution of the war.

2. Landing from a steamer in Rotterdam with intent to communicate to officials of the German Government the original messages and to receive from them the messages to be reconveyed by him to certain named persons.

The next case is *Stephan* v. *United States*, 133 F. (2d) 87 (C. C. A. 6th, 1943), 318 U. S. 781, 63 Sup. Ct. 858 (1943), 319 U. S. 783, 63 Sup. Ct. 1172 (1943). This case was discussed in petitioner's first brief at page 35 and in respondent's first brief at pages 53 and 61. As we pointed out before, proof of Stephan's guilt was overwhelming and several of the overt acts plainly sufficient. The record failed to present in any form the points now before this Court.

In *United States* v. *Leiner* (see Appendix to petitioner's first brief), the overt acts alleged in the indictment (1942) were substantially the same as those alleged in petitioner's indictment. The Court granted defendant's motion for a

directed verdict. The case is discussed in petitioner's first brief at page 32 and in respondent's first brief at page 66.

## General Conclusions

We have tried to sketch a comprehensive background of precedent, English, and American, as a foundation upon which to build our argument relative to the specific questions at issue. To avoid confusion we now recapitulate our conclusions in general form:

The substance of our contentions is the same as before, that none of the overt acts submitted to the jury was legally sufficient, as none of them openly manifested treason; that the two witness rule would be meaningless verbiage if the basic act of treason could be proved by a single witness and two witnesses were required merely to substantiate some insignificant detail; that the false statements charged in overt act 10 in no event constitute a treason of adhering to enemies, giving them aid and comfort; and that the proofs were otherwise insufficient to comply with the two witness rule. We maintained these points upon the basis of the English cases decided before the American Constitutional Convention. We still maintain this same position, as will be apparent in the discussion which follows (*infra*, pp. 41 *et seq.*).

The scope of the questions now before the Court, however, is such as to touch practically every phase of the law of the treason of adhering to enemies. The task of following the lead of every precedent and the mass of historical data is endless. Since the Court directed reargument and new briefs, we have spent many months in the most careful research and study, in the light of the questions from the bench at the time of the first argument. Certain new points have thus developed which we have felt it was our duty to present, not only because they strengthen the contentions

already made but also because of the general importance of the cause and the circumstance that this is the first time a judgment of conviction for treason brings before this Court on the merits the whole problem of construing the constitutional definition of treason.

So that these new points may not serve to confuse the contentions already advanced, we now restate them.

(1) While we were at first disposed to believe that the English precedents of constructive treason were in a manner taken over and as it were made a part of the American treason of adhering to enemies, giving them aid and comfort, a more thorough study of the English cases, together with new early American material not previously known to us, makes it clear that the constitutional definition created an entirely new pattern, which was never intended to include mere attempts or abortive conspiracies. The petitioner is entitled to the benefit of this point and we now assert that each of the overt acts submitted to the jury is insufficient, for the additional reason that it is not charged nor did the proofs establish that petitioner in fact gave any aid and comfort to the enemy. We now urge the Court to hold that, as in the case of levying war, so in the case of adhering to enemies, mere preliminaries, such as attempts and conspiracies will not suffice.

There is ample justification for such a holding. The English law concerning overt acts of adhering was directly affected by the constant association of that species of treason with the treason of compassing the king's death. By freeing the treason of adhering from this association, the Constitutional Convention intended to rid the crime of those elements carried over from the treason of compassing the king's death, and to return to the original and patent meaning of the statute 25 Edward III in so far as that statute concerned the treason of adhering to enemies.

(2) Further clarifying the definition of an overt act one which must openly manifest treason, we say that overt act must be an act of treason, that is such an act when coupled with evidence of the accused's owing legiance to the United States, and his traitorous inte would justify submission of the case to the jury."

The Convention's conception of an overt act of adheri was probably best represented by the statute concernin treason passed by the Pennsylvania Assembly in 1777. this statute only an act of treason was an overt act adhering. An overt act of treason had been thus define by Blackstone, Hawkins, and Foster, with whose works th members of the Convention were well familiar,[35] and th was the definition of an overt act of treason given by Chi Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. N 14,693 (C. C., D. Va. 1807) at p. 172; and by Greenleaf i his *Treatise on the Law of Evidence* (Boston, 1899), Vol III, § 244, p. 232. So also, the charge of Lord Chief Justic Reading in the latest English case, *Rex* v. *Casement*, [1917 1 K. B. 98, 86 L. J. K. B. 467, is to the same effect. Lor Chief Justice Reading was then in 1917 expounding the statute 25 Edward III, and the Court in *United States* v. *Robinson*, 259 Fed. 685 (D. C., S. D. N. Y., 1919) and *United States* v. *Leiner* (Appendix to petitioner's first brief), fol lowed his lead in interpreting the Constitutional provision based on this statute.

[35] "The superior authority of adjudged cases will never be controverted But, those celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected These books are in the hands of every student. Legal opinions are formed upon them; and those opinions are afterwards carried to the bar, the bench and the legislature. In the exposition of terms, therefore, used in instruments of the present day, the definitions and dicta of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitle to respect." Chief Justice Marshall in *U. S.* v. *Burr*, 25 Fed. Cas. No. 14,693, at p. 160.

II

**The overt acts submitted to the jury were legally insufficient**

Of the overt acts alleged in petitioner's indictment, overt acts numbered 1, 2, and 40 were submitted to the jury.

A

Overt acts 1 and 2, which are of similar substance and may be considered together, read as follows:

> "1. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did meet with Werner Thiel and Edward John Kerling, enemies of the United States, at the Twin Oaks Inn at Lexington Avenue and 44th Street, in the City and State of New York, and did confer, treat, and counsel with said Werner Thiel and Edward John Kerling for a period of time for the purpose of giving and with intent to give aid and comfort to said enemies, Werner Thiel and Edward John Kerling.
>
> "2. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at the Twin Oaks Inn at Lexington Avenue and 44th Street, and at Thompson's Cafeteria on 42nd Street between Lexington and Vanderbilt Avenues, both in the City and State of New York, for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel."

Since there was no proof whatever offered by the Government concerning the subject matter of the conversation between petitioner and Thiel and Kerling, and Thiel alone, the overt acts must be treated as alleging simply that the

petitioner, on the occasions specified, met and talked with Thiel and Kerling, and Thiel alone.

These alleged overt acts are clearly insufficient. They are not acts of treason. They are not such acts as the proof of which, when accompanied with evidence of petitioner's allegiance to the United States and a traitorous intent would warrant submission of the case to the jury. In other words, meeting and talking with an enemy without more is not an act which on its face gives the enemy aid and comfort. As Chief Justice Marshall said, *supra*, p. 33, treason consists of overt acts; and the mere meeting and talking with an enemy is not treason. In this overt acts 1 and 2 are distinguished from those acts recognized to be sufficient overt acts of the treason of adhering to enemies, such as giving the enemy intelligence, sending them provisions, selling them arms, treacherously surrendering a fortress and the like.

While respondent contends and the Circuit Court in this case has held that an overt act in treason has no more significance than an overt act in conspiracy (R. 485), this contention finds not the slightest shred of support in any of the adjudicated cases nor in the ample discussion of the subject by textwriters of eminent authority. Nor has any reason been advanced to support a view at the same time so surprising and so much at odds with American tradition.

Overt acts 1 and 2 do not even satisfy the rule in *Lord Preston's* case, [1691] 12 How. St. Tr. 646. Meeting and talking with Thiel and Kerling, and Thiel alone is not alleged to be (which is conclusive), and the evidence does not show it to be, an act in conscious preparation for the doing of an alleged overt act which is an act of treason in the way that boarding the wherry in Middlesex was alleged in Lord Preston's indictment to be for the purpose of boarding a boat to take treasonable papers to France. Tested by any rule supported by precedent at the time of the American

Constitutional Convention, overt acts 1 and 2 are insufficient.

B

Overt act 10 reads as follows:

"10. Anthony Cramer, the defendant herein, on or about June 27, 1942, at the Southern District of New York and within the jurisdiction of this Court, did give false information and make false statements regarding Werner Thiel, an enemy of the United States, to officers and agents of the United States, to wit, John G. Willis and A. E. Ostholthoff, Special Agents of the Federal Bureau of Investigation, Department of Justice, then and there engaged for and on behalf of the United States in investigating said Werner Thiel and his activities in the United States, said false information and false statements being in substance as follows, to wit: (1) That Werner Thiel's name was 'Bill Thomas'; (2) That from March 1941 until June 1942, Werner Thiel had been working in a factory on the West Coast of the United States; (3) That during the aforesaid period, Werner Thiel had not been out of the United States; (4) That the money belt given him by Werner Thiel in June 1942, had contained only a couple of hundred dollars which Werner Thiel had owed him; (5) That $3,500 in his safe deposit box at the Corn Exchange Bank Trust Company, 86th Street Branch, belonged to him and to no one else, had been obtained by him from the sale of his securities, and was kept by him in a safe deposit box because he considered it safer there than in his savings account at said bank; the aforesaid false information and false statements being given and made for the purpose of concealing the identity and mission of said enemy, Werner Thiel, and for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel."

1

It is to be observed that there is no charge that these misstatements in fact gave aid and comfort to the enemy.

in any manner, shape or form, however indirect and remote. The allegation merely charges that the statements were made "for the purpose of giving and with intent to give aid and comfort." It is equally clear on the evidence that no aid and comfort was given nor was it possible to give any aid and comfort, as Thiel and Kerling as well were already, and had for some days previously been, in the custody of officers of the United States. If we are correct in our contention that the founders did not intend the constitutional definition of treason to include mere abortive attempts, this overt act 10 must fall.

2

Let us assume, however, that the view will prevail in this Court that, despite the change of pattern of the law of treason and despite the great difference in attitude toward the subject which is manifested by the host of circumstances hereinabove referred to, it was the intention of the founders to include in the definition of the treason of adhering to enemies, giving them aid and comfort, the various constructive extensions, which seem so utterly at variance with the plain wording of the constitutional definition and the American attitude toward treason as expressed by Chief Justice Marshall in *Ex Parte Bollman*, 4 Cranch 75, 125-127, 8 L. S. 75, 125-127, *supra*, p. p. 31-32. In other words, let us assume, for the purposes of argument, that a mere attempt to give aid and comfort to the enemy might suffice. Tested thus exclusively by the English precedents in force at the date of the Constitutional Convention, can it be said that petitioner's false statements as described in overt act 10 constituted an act of treason?

At the threshold of the discussion of this point we would have the court pause for a moment and consider a few undoubted historical facts. No one can doubt that, throughout the full course of the 16th, 17th and 18th centuries in England the methods of questioning and extorting informa-

tion from those in the custody of the law were rigorous, relentless and all too often barbarous and inhuman. Nor can there be doubt that, especially in cases of actual or suspected treason, the officers of the law bent every effort to obtain information of the identity and whereabouts of co-conspirators and participants in the all too numerous plots against the royal prerogative. Plainly, there must have been innumerable instances in which those subjected to such unremitting questioning made false statements relative to the identity and whereabouts of the others with whom the prisoner had planned and sought to consummate his treason. And yet, the most exhaustive research has failed to reveal a single English case in which the making of such false statements to officers of the law is alleged as an overt act of treason.

The English judges bent all their ingenuity in the direction of making the treason of adhering to enemies, giving them aid and comfort, flexible and then in stretching this flexible rule by construction to cover every conceivable instance to which they thought it might with any show of reason be extended. Just as Chief Justice Marshall solemnly announced that in America treason was not to be extended to doubtful cases but rather restricted and limited to the plain wording of the Constitution, so these English judges took the opposite view. Why is it then that no single English judge ever conceived the thought, so far as history reveals, that a man in custody under suspicion of treason might suffer the full penalties of the law by merely making a single false statement as to the identity and whereabouts of his confederates?

We think there were many reasons for this void. As a mere matter of humanity, it seems a shocking thing that the mere making of a false statement which leads to nothing should be the basis of a charge of treason. Were such a

view to prevail almost any statement might be twisted and construed into a treasonable utterance having a tendency to conceal the identity and whereabouts of a confederate or enemy agent. Were such a view to prevail the floodgates would indeed be down in time of war and no man caught in the toils of the law would be safe from a charge of treason.

The present case well illustrates this danger. There is no proof nor allegation that the false statements alleged to have been made by petitioner were then material to any interest of the Government in investigating Thiel or that the making of the statements gave, or could possibly give, any aid and comfort to the enemy. For all that appears, the statements may have been entirely irrelevant to any question concerning Thiel in which the Government was interested. For all that appears, Thiel was not only in custody but the Government was fully possessed of accurate and complete information of his movements and design prior to his arrest, including his activities in the United States before he returned to Germany. The assertion that these false statements had a tendency to give aid and comfort and that they were made by petitioner with the intent and purpose of giving aid and comfort to the enemy are mere empty conclusions.

It is significant that Congress had made it a distinct crime to do the acts which petitioner is alleged to have done in overt act 10. 50 U. S. C. § 33 provides as follows:

> "Seditious or disloyal acts or words in time of war. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the

United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both." [38]

3

Petitioner has thus far considered only those defects appearing on the face of overt act 10. When the evidence is considered other defects appear.

In England, prior to our Constitutional Convention, the acts of sending letters containing military information to the enemy, and cruising to take the king's ships, goods, and money, though the letters were intercepted and none of the king's ships taken, were held to be overt acts of the treason of adhering to enemies. One of the reasons given for such a ruling was that the accused had done all that he could do (see *supra*, p. 31). But petitioner did not do all that he could do. Petitioner was taken into custody by F. B. I. agents about 10:50 P. M. on June 27, 1942 (R. 69, 105) and was taken directly to the New York office of the F. B. I., arriving there at 11:20 P. M. (R. 105-106, 291). He was then questioned by F. B. I. agents and made the false statements constituting alleged overt act 10. However, during this same examination, and about an hour after

[38] In *U. S.* v. *Hoxie*, 26 Fed. Cas. No. 15,407 (C. C., D. Vt., 1808), defendant was indicted for the treason of levying war in that he and about sixty other armed men forcibly took a raft of timber from the possession of a Federal Collector. In its charge to the jury, the Court noted that [illegible]ss had made it a distinct crime to resist or oppose a customs offic[illegible] the execution of his duty, and then continued, at pp. 406, 401: "These laws of Congress have been mentioned, and others of a like nature might be referred to, to satisfy you, that the legislature never supposed an act of this kind treason, as they would only have declared its punishment; and, although if it be treason by the constitution, no act of Congress can make it otherwise; still, a legislative understanding of that instrument, if not conclusive, is entitled to a very respectful attention." The prisoner was acquitted.

he made his first false statement (R. 121-122), petitioner retracted all of his false statements and told the F. B. I. agents what he knew about Werner Thiel (R. 122-123, 154-155). Thus, before action was taken or could be taken on the basis of petitioner's false statements, petitioner retracted the statements and told the truth. He did not do all that he could do, and to call his very temporary and inconclusive attempt to lie to the F. B. I. an overt act of treason would be to extend the English precedents, themselves constructive extensions, making treason of an attempt to give the enemy aid and comfort. While depositing a letter addressed to enemy representatives and containing military information, in a Government letter-box was held in England to be an overt act of adhering to the enemy, *quaere* whether it would be a sufficient overt act to show that the accused walked toward the letter-box but destroyed the letter and deposited nothing.

The crime of perjury consists of testifying falsely to a material matter under oath and it is readily understandable that the crime should be deemed complete on the giving of false testimony without regard to subsequent retraction. But the wording of the crime of rendering the enemy aid and comfort on its face calls for actual aid and comfort to the enemy, and raises grave doubt to what extent an attempt to give the enemy aid and comfort can constitute the crime. Thus retraction has greater significance in treason than in perjury. Even in perjury, however, there is authority that there is no perjury if a false statement under oath is retracted in the same proceeding in which it is made. (See cases cited in *United States* v. *Norris*, 300 U. S. 564 (1937)), at pp. 575-576. While this Court did not follow this ruling in the *Norris* case, *supra*, where interpretation of §125 of the *Criminal Code* was involved, it there appeared that respondent's retraction occurred after

he had left the stand and the examination in which he had made the false statement had concluded. This Court noted, at p. 576, that a New York Court refused to follow the ruling noted above when the retraction was not a part of the same examination at which the false statement was made.

There is another point involving the extent to which an attempt to give the enemy aid and comfort can be treason. In overt act 10 it is alleged that petitioner made the false statements "for the purpose of concealing the identity and mission of said enemy, Werner Thiel." But Werner Thiel was arrested by F. B. I. agents on June 23, 1942 (R. 86), four days before petitioner made the false statements alleged in overt act 10. Since the Government thought it had enough information to justify arresting and holding Thiel, it is doubtful that anything Cramer said about Thiel could succeed in concealing his identity and mission which seems to have been already known to the Government. To hold that statements which could not possibly aid the enemy are overt acts of rendering the enemy aid and comfort would be an innovation in the law of treason. While Vaughan (*Rex* v. *Vaughan*, [1696] 13 How. St. Tr. 485) did not succeed in taking the king's ships when he went cruising for the French, there were the king's ships to be taken; and while Gregg (*Regina* v. *Gregg*, [1708] 14 How. St. Tr. 1371) and De La Motte (*Rex* v. *De La Motte*, [1781] 21 How. St. Tr. 687) did not succeed in getting their letters containing military information to France, there was a government in France to make use of the information contained therein. For petitioner, however, so far as appears in the allegations of the indictment or in the proof, there was no possibility in fact of concealing the identity and mission of Werner Thiel.

Moreover, with respect to overt act 10, there is the fact that petitioner's statements, which form the substance of that act, were made by him subsequent to the time he was taken into custody but prior to the time of his arraignment.

The statutes, 18 *U. S. C.* § 595 and 5 *U. S. C.* § 300a, giving petitioner the right to be taken immediately to a committing officer on his arrest are set forth in petitioner's first brief at pp. 39-40. The facts establishing that petitioner was not taken to a committing officer immediately on his arrest, and that his statements were made after his arrest and prior to arraignment are set forth in petitioner's first brief at pp. 36, 39.

If petitioner had been taken before a committing officer immediately on his arrest, he would have heard the justification for his detention and have learned of the seriousness of the charges which might be made against him. He would have been asked whether he had counsel to represent him. Actually none of this was done. It is clear that when petitioner was questioned he had no realization that any serious charge would be preferred against him, and his chief concern was about his right to retain the $200 which had been given to him by Thiel in repayment of an indebtedness (R. 134-135). He was, of course, not represented by counsel at the examination, and the arrest and examination came in such close sequence that he had no time to consider what steps he might or should take for his own protection. As the questioning of petitioner on the night of his arrest continued and he first got wind of the serious implications of his conduct, when F. B. I. Agent Ostholthoff said to him, "Cramer, you don't seem to realize in what a serious thing you have been involved" (R. 292), petitioner immediately retracted his false statements and told the truth.

Petitioner does not contend in the least that he is morally blameless for giving the false statements, but it does seem a grievous injustice that petitioner should have been arrested apparently on suspicion of treason, and while under illegal restraint caused to make statements, which later formed the very substance of the crime of which he was accused and found guilty. Surely statements thus obtained by illegal means cannot constitute an overt act of treason.

Petitioner contends, therefore, that overt acts 1, 2, and 10, as alleged and proved, are insufficient overt acts of the treason of adhering to enemies. Since these overt acts were the only ones submitted to the jury the indictment should be dismissed.

III

**Overt acts 2 and 10 were not proved in accordance with the Constitutional provision that each overt act must be proved by the testimony of two witnesses.**

A. *Overt Act 2.*

Overt act 2 consists of two meetings between petitioner and Thiel, one at the Twin Oaks Inn, the other at Thompson's Cafeteria. The facts supporting petitioner's contention that these two meetings were not testified to by the same two witnesses are fully set forth at pp. 3-9 of petitioner's reply brief on the first hearing of this case. As there pointed out, respondent erred in stating that Agent Fisher testified to the meeting between petitioner and Thiel at the Twin Oaks Inn. Agents Rice (R. 80-81), and Willis (R. 101-102), testified to the first part of overt act 2 and Agent Rice (R. 81) testified to the second part of this act. The only question is whether Agent Willis can be said to have proved the second part of the act. He testified that petitioner and Thiel went into Thompson's Cafeteria, stayed there awhile having refreshment, and came out (R. 102). He did not testify that they were together while

in Thompson's Cafeteria, and thus his testimony cannot be said to establish the second part of overt act 2, that petitioner "did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at * * * Thompson's Cafeteria * * *".

But, as pointed out in petitioner's reply brief at page 9, even if Agents Rice and Willis did testify to both parts of overt act 2, under the Court's charge the jury was permitted to find overt act 2 proved on the testimony of two different sets of witnesses, and, since Agent Stanley testified to the second part of overt act 2, could have found the act proved as to each of its parts by two different sets of witnesses.

The Constitution provides, Article III, Section 3, that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Petitioner contends that the requirement that two witnesses testify to the same overt act clearly means that two witnesses must testify to the whole overt act. If, where the overt act consists of two parts, two witnesses testify to each of the parts, but no two to the act as a whole, there cannot be said to be two witnesses to the overt act, which can mean nothing other than the overt act as alleged.

There is very little authority on this question either in this country or in England, probably for the reason that in most treason cases the overt act alleged is a single act. The question arises here only because of the unnecessary peculiarity of the pleading. If overt act 2 were a sufficient overt act, then either of its parts would be sufficient, and the Government could easily have avoided the question here raised if it had alleged the meeting at Twin Oaks Inn as one overt act and the meeting at Thompson's Cafeteria as another overt act. Sustaining petitioner's contention would not, therefore, make proof of an overt act more diffi-

cult but would only require more care in the alleging of the overt act.

It seems quite clear from the many cases already discussed that each overt act *as alleged* must be taken as a unit. The Government elects at its peril to plead several matters as a single overt act when it could, had it chosen to do so, have pleaded them separately.

There is reference to the point in question in the case of *Regina* v. *McCafferty*, [1867] 10 Cox C. C. 603, a case of the treason of levying war. The report is incomplete, and it is impossible to determine the precise facts to which the principle of law was addressed. Mr. Justice O'Hagan, one of the eight judges rendering opinions in the case, stated, at p. 608:

> "The evidence required by the statute to sustain a particular overt act is not necessarily the evidence of a single witness; the overt act may be, and generally is, a composite thing, passing through distinct stages, and made up of various circumstances; and to prove it in its integrity, several witnesses speaking to those different stages and circumstances may be necessary. If their joint evidence established the act to the satisfaction of the jury, the terms of the statute are satisfied."

It is possible that another one of the judges, Mr. Justice Fitzgerald, may have accepted this principle, but he does not base his opinion on it. The other six judges have nothing to say on this point of the case and base their decisions on entirely different grounds. The case, as a whole, seems too inconclusive to be held a precedent; and to this inconclusiveness must be added the fact that the case is an English one (and the witness rule is less strict in that country) decided in 1867, long after our Constitutional Convention.

In our country, the closest reference to this question of law seems to be found in *United States* v. *Fricke*, 259 Fed.

673 (D. C., S. D. N. Y., 1919), where Judge Mayer states at p. 677:

> "Where the overt act is single, continuous, and composite, made up of, or proved by, several circumstances, and passing through several stages, it is not necessary, in order to satisfy the provisions of the Constitution requiring two witnesses to an overt act, that there should be two witnesses to each circumstance at each stage, as distinguished from the necessary proof of two witnesses to an act other than continuous and composite.
>
> That means this: If one of the overt acts, we will say, was as in this case the sending of a telephone message, and you have the testimony of the telephone operator who received the message for transmission, and the testimony of the person to whom the message was transmitted, there are the stages of one transaction proved by two witnesses, as the one witness was at one end of the telephone and the other witness at another."

This statement has reference to an overt act that is a single act. Thus it does not apply to overt act 2 in petitioner's case which is not a single act but rather consists of two meetings, each different in time and place.

The authorities, therefore, do not help in the solution of the problem. Petitioner submits, however, that the interpretation clearly called for by the words of the Constitution, "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act" is that there must be two witnesses to the whole overt act.

B. *Overt Act 10.*

In overt act 10 (*supra*, p. 43) it is alleged that petitioner made certain false statements for the purpose of concealing the identity and mission of Thiel. The fifth false statement alleged is "That $3500 in his safe deposit box at the

Corn Exchange Bank Trust Company, 86th Street Branch, belonged to him and to no one else, had been obtained by him from the sale of his securities, *and was kept by him in a safe deposit box because he considered it safer there than in his savings account at said bank.*" Only one witness, Agent Willis (R. 108), testified to petitioner's making the statement set out in italics above.

The Circuit Court held that this part of overt act 10 could be regarded as mere surplusage, and further, that the jury could not conceivably have relied on it solely to establish the act, for it presupposed petitioner's claim of ownership which was proved by two witnesses. As petitioner argued in his first brief (p. 45), the part of overt act 10 in question does not presuppose petitioner's claim of ownership, and even if it did it is extremely doubtful that the claim of ownership of the $3500 would have been such proof that petitioner made false statements for the purpose of concealing Thiel's identity and mission as to warrant submission of the overt act to the jury. To the extent then that the jury might have relied on the part of overt act 10 in question to establish commission of the overt act, it was error for the Court to submit that part to the jury.

In its first brief, however, respondent argued that petitioner's own testimony could be availed of to establish the part of overt act 10 in question, that petitioner under the Constitution could be one of the two witnesses against himself.

In his reply brief petitioner contended that confession in open court was the only act by which the accused could determine his guilt, and that he could not be one of the required witnesses to the overt act. Petitioner, at pp. 10, 11 of his reply brief, quoted that part of the English statute 5 and 6 Edward VI having to do with the two witness rule. There the two witnesses were called "accusers"

and were required to be brought before the party accused. Petitioner pointed out that while the later English statute, 7 William III, used the word "witnesses" rather than "accusers", there is no indication that this statute changed the rule with respect to the identity of the witnesses required. Indeed East indicates that the words "accusers" and "witnesses" have the same meaning in the English statutory law of treason.[37]

The case bearing most directly on this point is *United States* v. *Magtibay*, 2 Philippine Island Reports 703 (1903). The Philippine law of treason, so far as it concerns proof of the overt act, is substantially the same as the Constitutional provision, and is found in Section 9 of the Act of Congress of March 8, 1902.

In this case it appears that the evidence against the accused, apart from his own testimony, was an admission to an inspector that he had given arms to a General Montalon, who was in armed rebellion against the Government, and that there was found on his person a commission from Montalon. The first question was whether this admission could be given in proof of the overt act. The Court held that it could not. The Court then went on to consider the effect of the accused's own testimony at the trial. On this point the report reads as follows, at p. 705:

> "The defendant testified as a witness in his own behalf at the trial. He denied that he had deserted, but claimed that he had been carried off by forces of soldiers of Montalon and taken to the latter's camp

[37] "The stat. 5 & 6 Ed. 6 c. 11, s. 12, enacts, 'That no person shall be indicted, arraigned, condemned, convicted, or attainted for any treasons that then were or after shall be, unless thereof accused by two lawful accusers (i. e., witnesses), which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the accused to prove him guilty of the treasons or offences contained in the indictment, unless the said party arraigned shall willingly without violence confess the same.'" East, *supra*, Ch. II, Sec. 63, p. 137

He promised to serve them, and they made him a lieutenant and gave him a revolver. He remained with them two weeks, but he says that it was against his will and that he had no opportunity to escape, except the time when he was captured. This is not a confession within the meaning of the said section 9. The confession there mentioned means a confession of guilt. The section cannot be extended so as to include admissions of fact made by him in giving his testimony after a plea of not guilty, from which admissions his guilt can be inferred. The evidence required by the act of Congress does not appear in this case."

While it does not appear clearly whether the point of the accused being one of the witnesses was raised, the Court does state that "The evidence required by the act of Congress does not appear in this case." If this point was not raised this is itself persuasive of its inefficacy.

The first point in the *Magtibay* case, *supra*, also appears by way of dictum in *United States* v. *Greiner*, 26 Fed. Cas. No. 15,262 (D. C., E. D. Pa., 1861). This is a report of proceedings before a District Judge for the commitment of the accused on a charge of treason. In his opinion on a motion to commit, the presiding judge stated, at p. 40:

"The evidence for the prosecution has consisted of the direct testimony of one witness to the alleged overt act, and of admissions made voluntarily by the accused party since his arrest. The Constitution provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The admissions here proved were not such confessions, and, upon the trial of an indictment, would not, in connection with the testimony of a single witness to the overt act suffice to warrant a conviction. * * *"

The judge went on to hold, however, that the Constitutional provisions concerning proof of the overt act were in-

applicable in proceedings before grand juries or in preliminary investigations such as were being held in that case.

It seems to be established, then, that it is not sufficient proof of the overt act that one witness testify to the act and another to an admission of the accused to the doing of the act. Unless the accused in taking the stand forfeits the protection afforded by the Constitutional provision concerning the requirement of two witnesses, then it follows logically that the accused cannot be one of the two witnesses to the overt act. Otherwise the accused, in being questioned on the basis of an admission, could be made to repeat the admission on the stand; and thus effect would be given to the admission otherwise inadmissible as proof of the overt act.

Petitioner submits that it is evident from the history of the two witness rule in treason, and from such authority as there is, that the accused cannot be one of his own "accusers."

## Conclusion

Petitioner has in this brief discussed only those points as to which this Court asked for additional briefs in its order of May 22, 1944. Petitioner does not intend to waive any of the points previously raised.

**The Judgment Appealed from Should be Reversed and the Indictment Dismissed or, in the Alternative, a New Trial Ordered.**

Dated: New York, September 29, 1944.

Respectfully submitted,

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